No. 11593.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

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Preliminary Statement.

This case was stipulated to be tried before the Tax Court with that of *Michael Downs v. Commissioner*, No. 11578 herein, as the basic facts are identical. These are in effect test cases involving hundreds of men employed at the Lockheed Overseas base in Ireland during the world war. Action has been suspended by the Treasury Department in many of these cases pending outcome herein.

Jurisdiction.

The Commissioner of Internal Revenue, Respondent herein, on August 31, 1945, acting through the Collector of the Sixth District of California at Los Angeles, mailed to Petitioner a notice of deficiency wherein, so far as material to this proceeding, the Respondent proposed ad-

ditional income taxes for the calendar year 1943 in the sum of $1311.01. [R. 7-10.]

Within the ninety day period, Petitioner, pursuant to Section 272(a), Internal Revenue Code, filed a petition with the Tax Court of the United States wherein it was alleged, among other things, that in determining the net income for the year 1943, the Commissioner and Revenue Agent in Charge erroneously included the sum of $2600 earned in the year 1942 and $5262.50 earned in the year 1943 by taxpayer outside of the United States while a bona fide resident of North Ireland, which said action by Respondent gave rise to the asserted deficiencies in tax and was erroneous. [R. 4-7.] Issue was duly joined by Respondent's answer. [R. 10-11.] The proceedings came on for hearing on June 20, 1946, before Honorable Eugene Black, Judge of The Tax Court of the United States. [R. 75-82.] Thereafter on November 12, 1946, the Court entered its memorandum Findings of Fact and opinion [R. 49-62], and on November 13, 1946, entered its decision that there was a deficiency in income tax for the calendar year 1943 in the amount $1311.01. [R. 63.]

Pursuant to Section 1142, Internal Revenue Code, on February 10, 1947, Petitioner filed a petition for review by this honorable Court with The Tax Court of the United States, invoking jurisdiction under Section 1141 Internal Revenue Code [R. 64-71] and on February 11, 1947, served notice thereof, with copy of petition, on Respondent. [R. 71-73.] A statement of points to be relied upon was served upon Respondent on March 21, 1947, and filed March 26, 1947. [R. 73-75.]

Petitioner at all the times herein mentioned was and is a resident of the County of Los Angeles except during

the period of his employment overseas as herein set forth. He filed his income tax return for the calendar year 1943 with the Collector of Internal Revenue at Baltimore, Md., as provided in Section 53(b)(1), Internal Revenue Code, but said return was by agreement with taxpayer reviewed and audited by the Collector of Internal Revenue and by the Revenue Agent in Charge in Los Angeles, California, in the Sixth Collection District of California; and deficiency notices were issued by said Collector of said Sixth District of California. [R. 7, *et seq.*]

And, pursuant to Section 1141(b)(2) of the Internal Revenue Code, Petitioner and Respondent through their respective counsel did, on March 19, 1947, stipulate and agree to and did designate the United States Circuit Court of Appeals for the Ninth Circuit as the Court to review the above entitled cause, which stipulation was filed with the Clerk of said Court on March 21, 1947. [R. 63-64.]

Questions Involved.

The Tax Court held that Petitioner was not, during the calendar year 1943, a resident of Great Britain and North Ireland within the meaning of Section 116, Internal Revenue Code, printed in the margin of its opinion. [R. 59.]

This section exempts from income tax "an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year." [R. 59.]

The questions raised on this appeal are:

1. What does Section 116, Internal Revenue Code, mean by "resident"?

2. Do the words "bona fide" limit the discretionary power of the Commissioner in determining whether or not the citizen is a resident to his satisfaction; or does he have the authority by the statute to determine residence regardless of the good faith of taxpayer?

3. Do Regulations 111, Sections 29.211-2, defining the term resident as used in the statute control the discretionary power of the Commissioner?

A secondary question involved in this appeal is whether or not petitioner was in effect on foreign soil, under the war conditions then existing, when he boarded on June 30, 1942, a vessel of British registry under a British captain, even though the vessel did not get away from its docks until the morning of July 1st.

We contend that the Commissioner and the Tax Court misconstrued Section 116, Internal Revenue Code, *supra,* and Regulations 111, Sections 29.211-2, *supra,* and misapplied same to the stipulated and uncontroverted evidence which is here and now as available to your Honorable Court as it was to said Commissioner and Tax Court; said facts being hereinafter set forth, to-wit:

Statement of Facts.

Early in 1942 Lockheed Aircraft Corporation (L. A. C.) entered into a contract with the United States Government to organize, equip and operate an aircraft depot at Belfast in North Ireland. [Stipulation, Ex. 2, R. 17.]

Between the middle of January and first of July, 1942, Industrial Relations Manager B. W. Messer and his assistant Lewis R. Osgood recruited about 3000 men — specialized types of mechanics from industries throughout the United States. They went into engine factories back east and watch repair plants for skilled instrument people. General Arnold (Hap Arnold) telegraphed to practically all manufacturers in the United States to release such personnel as Lockheed Overseas needed. [B. W. Messer, R. 77-78.]

This was not to be a mere maintenance base in North Ireland. It was rather to be and become a "modification" base. These men were to be near the flying base, to be in close touch with our bombers as they returned from day to day from their sorties over Europe, to re-design and re-build as necessary and overcome the faults of aircraft produced in this country; to determine under actual war conditions any weakness in our planes and immediately repair same. Obviously this made the Lockheed Irish bases very much an object for bombing by German fliers. [B. W. Messer, R. 77-78.]

Due to the nature of the project and uncertainty of the men returning, the employment force was instructed by management of the corporation to make the picture to prospective employees as dark as possible. They were to cross the Atlantic when the submarine hazard was the greatest during the entire war. The contract stipulated

that the men were more or less on their own, if taken prisoner. And the interviewers for Lockheed pointed out to these men that the possibility of being taken prisoner or being bombed, or being sunk by a submarine, was very serious. [Messer, R. 78.]

Although the first contract these men signed was for only six months, the application which these men signed and the interview with them was designed to eliminate a prospect who was not interested in staying overseas at least a year, because management then felt it was a long time project. [Lewis R. Osgood, R. 79; Application, R. 15.]

J. Gerber Hoofnel made application for foreign service on or about February 14, 1942, at Lockheed Placement Division, Burbank, California. He was then living at 501 So. Ardmore, Los Angeles, California. In answering the questions on his application he stated that he was willing to go to any part of the world and that he understood his services might be in a war combat zone and travel to this point would be hazardous. [Application, R. 15.]

From Jan. 1, 1942, to June 30, 1942, Petitioner was employed in the United States by Vega Aircraft Corporation and Lockheed Overseas Corporation as a secretary at Burbank, California. [Stipulation, R. 12.]

In May, 1942, he signed the above noted contract with Lockheed Overseas Corporation for services in the British Isles. [Ex. 2, R. 17-31.] Pursuant to said contract he embarked June 30, 1942, on H.M.S. Maloja, a vessel of British registry (at New York Harbor). The Maloja sailed from New York City early in the morning of July 1st bound for the British Isles. [Stipulation, R. 12.]

Hoofnel testified: "We got on the boat on June 30th (1942), and we could not get off—were restricted to the boat and could not communicate with anyone from it. It was a boat of British Registry with British officers. When I went over I wanted to stay over there as long as necessary. In fact, I did not know how long I would be there when I left . . . my intention was to stay as long as necessary, for the duration of the war." [R. 80.]

He first went to a base at Glazebrook, England, and after two weeks went to the base in North Ireland. [R. 80.] He was secretary to B. W. Messer. He was not asked by the British or Irish government to pay any income tax while overseas. The contract he signed with Lockheed Overseas Corporation provided that if he was taxed by the British government, Lockheed would pay same. No official of the treasury department or of Lockheed withheld any of his income impounded in the United States. Nothing was withheld until he came back and landed in the United States. [R. 81.]

Hoofnel testified that one reason for living at the base in Ireland was that the L O C men were subject to being called on duty 24 hours per day, and it was quite necessary that they be close to their place of employment. He ended his testimony thus: "It was my intention to return to the United States as soon as my work with Lockheed in the British Isles was complete, and I never at any time intended to stay in North Ireland."

As of May 1, 1943, Petitioner entered into a written contract with Lockheed in which he agreed to render such services in connection with said aircraft depot as might reasonably be assigned to him for the duration of the contract between the Government and Lockheed as from time to time extended (which meant for the duration of the war and beyond). [Ex. 3, R. 33.]

STATEMENT OF POINTS RELIED UPON.

1. The Tax Court of the United States erred in finding as a fact or deciding as a matter of law that the Commissioner of Internal Revenue had discretionary power to disregard the plain language of Regulations 111, Sections 29.211-2, and assess the tax here involved.

2. The said Tax Court erred in failing to find as a matter of fact and deciding as a matter of law that petitioner under said Sections 29.211-2 of said Regulations was a bona fide resident of the British Isles and North Ireland for the calendar year 1943, and exempt from income tax on his overseas salary of $5262.50 for that year.

3. The said Tax Court erred in finding as a fact or deciding as a matter of law that Internal Revenue Code, Section 116(a)(1) vested in the Commissioner discretionary power to determine that taxpayer was not a resident of the British Isles for the taxable year 1943, even though he acted bona fide and met the conditions of Regulations 111, Sections 29.211-2; and said Court erred in failing to find that under said section of Internal Revenue Code and under said section of said Regulations, the Petitioner was exempt from income tax on his said overseas salary.

4. The said Tax Court erred in finding as a fact or deciding as a matter of law that taxpayer was not a bona fide non-resident of the United States for more than six months during the taxable year 1942, and that the $2600 earned by him during that period should not be excluded from his 1942 income.

ARGUMENT.

If the decision of the Tax Court that petitioner was not a *bona fide* resident of Great Britain and North Ireland during the calendar year 1943 be regarded as a finding of fact, it is contrary to the uncontroverted evidence; and therefor such decision may be properly reviewed by this Honorable Court.

If this portion of the decision of the Tax Court be regarded as a conclusion of law, then it is also a proper subject of review by this Honorable Court.

Bogardus v. Commissioner, 302 U. S. 34, 58 S. Ct. 61, 82 L. Ed. 32;

Claridge Apts. Co. v. Commissioner of Internal Revenue, 89 L. Ed. 139.

Applicable Law.

Section 116, I. R. C. reads as follows:

"SEC. 116. EXCLUSIONS FROM GROSS INCOME. (As amended by sec. 148(a), Revenue Act of 942.)

In addition to the items specified in section 22(b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.—

(1) Foreign Resident for Entire Taxable year.— In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a *bona fide* resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United

States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individuals shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection."

Purpose and Intent of Section 116, I. R. C.

By its very wording it is plain that Congress intended that this section should have a liberal and not a narrow and restricted meaning.

To better understand this it is well to consider how this section read prior to its amendment in the latter part of 1942.

When the three thousand or more Lockheed men were employed to go overseas in the early half of 1942, the law then exempted from tax gross income to an individual citizen of the United States who was a *bona fide* non-resident of our country for more than six months during the taxable year.

In *Commissioner of Internal Revenue v. Fiske's Estate,* 128 F. (2d) 487; certiorari denied 317 U. S. 635, construing this section as it stood in 1942, the Court said:

> "It is agreed that Sec. 116(a) was intended to stimulate foreign trade, and to relieve our citizens resident in foreign countries, engaged there in the promotion of American foreign trade for more than six months of the taxable year, from tax upon the income which they earned in the foreign country. In construing the phrase *'bona fide* nonresident of the United States for more than six months during the taxable year,' the Bureau of Internal Revenue

has interpreted it as applying to any American citizen actually outside the United States for more than six months during the taxable year, and this construction finds support in the legislative history of the act."

However the Report of the Senate Committee on Finance, C. B. 1942-2, pp. 548, 549, found that:

". . . This provision of the present law has suffered considerable abuse, in the case of persons absenting themselves from the United States for more than six months simply for tax-evasion purposes."

After differences between the House of Representatives and the Senate, Congress finally enacted the present Sec. 116, *supra,* effective after December 31, 1942, requiring the citizen to establish to the satisfaction of the Commissioner that he is a *bona fide* resident of a foreign country during the entire taxable year, as shown in Revenue Act 1942, Sec. 148(a).

In light of this legislation it seems clear the words "to the satisfaction of the Commissioner" modify the words *"bona fide"* rather than change the meaning of the word resident as usually used in the taxing statutes. As an administrative measure it would seem very fitting and proper and effective for the Commissioner to determine whether or not the citizen in question be a *bona fide* resident.

There is no question about the good faith of petitioner or his Lockheed associates in absenting themselves in Europe during the war. The Tax Court warmly admits this in the following statement in the companion case of Michael Downs No. 11578 in this Court:

"We agree that the good faith of petitioner in going overseas as an employee of Lockheed, and ren-

> dering important and essential services to the war effort cannot be questioned. We do not understand that it is being questioned by the Commissioner." [R. 65.]

It being agreed that there is no question of *bona fides* involved in this case, the next question is does Sec. 116, I. R. C., *supra,* vest the Commissioner with discretion to modify or vary the well established rules of law and the Regulations that define what constitutes residence. Put it another way, in absence of any question of *bona fides,* do the words "to the satisfaction of the Commissioner" nevertheless attach to or modify the word "residence" as used in 116 I. R. C., *supra?*

We contend that the amendment to that section of the Revenue law was intended as an administrative measure to enable the Commissioner to limit the exemption from tax to citizens residing abroad in good faith and not for tax evasion. We contend that there is no intent to substitute the mind of the Commissioner for the ordinary rules of evidence that determine residence. Where the facts are uncontroverted as they are here, your Honorable Court, being fully advised upon the law, is free to determine the question of residence here involved without any handicap created by the mind of the Commissioner.

In *Commissioner of Internal Revenue v. Swent,* 155 F. (2d) 513, at 515, the Court says:

> "The word 'resident' (and its antonym 'nonresident') are very slippery words, which have many and varied meanings. Sometimes, in statutes, residence means domicile; sometimes, as in the instant case, it clearly does not. When these words, 'domicile' and 'residence,' are technically used by persons skilled

in legal semantics, their meanings are quite different. This distinction is clearly set out in Matter of Newcomb's Estate, 192 N. Y. 238, 250, 84 N. E. 950, 954:

"'As domicile and residence are usually in the same place, they are frequently used, even in our statutes, as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.'

"We think the error into which the Tax Court fell was partially caused by a confusion of these terms in lending to the word 'residence' some attributes which really belong only to the word 'domicile,' and by laying too great stress, as to 'residence,' on the *animus revertendi.*"

The Tax Court further erred in resting its decision in this case largely upon its decision made, just previously the same day, in *Arthur J. H. Johnson v. Commissioner*, 7 T. C. No. 122, because the cases are clearly distinguishable. Johnson went to Greenland with no such commitments and no such contract as petitioner had with L. O. C. A treaty with Denmark gave the United States Government peculiar jurisdiction over the territory in which it operated in Greenland. The dissenting opinion of Judge Leech in that case very well answers the position of the majority that the taxpayer, in order to claim residence

abroad, must show payment of tax there. Says the dissent:

> ". . . Neither Congress in the controlling statutory provision, nor the respondent in his regulations construing that provision, mentions such exemption as even affecting, much less controlling, the imposition of the contested tax. That it would have been easy to have done so is obvious. For us to interpolate such criterion seems to me to be judicial legislation."

Regulations 111, Sec. 29.211-2 Remove Any Doubt About the Meaning of the Term "Residence."

If there were any doubt about the meaning of the term residence in Sec. 116, I. R. C., it is clearly removed by definition in Regulation 111, Sec. 29.211-2 which reads as follows:

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or aban-

doned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

Regulations 111, Sec. 29.116-1 provides in part . . . "Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principle of Sec. 29.211-2 . . ."

Having admitted that the Commissioner is bound by Sec. 29.211-2 *supra,* nevertheless the Tax Court decided against petitioner largely on the Commissioner's interpretation of 116 I. R. C. in I. T. 3642 Cum. Bull. 1944, page 262, saying that "if the construction given in I. T. 3642 *supra* was wrong, it should be given no weight, but we are not convinced it was wrong."

We agree that the decision of the Commissioner in I. T. 3642 *supra,* was not wrong. It was right because in that case a citizen of the United States, who went to Canada on January 1, 1943, where he was employed on a war project, intended to stay only until May 1944,— a fixed time of just over a year. He was clearly a transient as defined in Regulations 111, Sec. 29.211-2 *supra.*

But by this same section of Regulations (Hoofnel) was not a transient. He was a resident overseas for the full year 1943. He went overseas for an uncertain period as prescribed in said section of Regulations. The period was uncertain all through 1943 for he intended to stay for the duration of the war and beyond. The duration of the war was then emphatically uncertain for the Belgian Bulge had not yet taken place and no one knew when our Americans overseas would come back or if they ever would come back.

He was over there temporarily, as the Section prescribes, but his purpose was of such a nature that an extended stay might have been necessary for its accomplishment. And so in the language of the Section he became a resident over there even though it was his intention at all times to return to his domicile when the purpose for which he came had been consummated or abandoned.

Secondary Point on Appeal.

The Tax Court in its opinion correctly states the final question involved in this appeal as follows:

> ". . . the question whether petitioner was absent from the United States for more than six months in 1942 depends upon the answer to a simple question of law, namely: Is an American citizen 'outside the United States' when he is aboard a vessel belonging to a foreign Government tied to a pier in New York harbor? Petitioner boarded a British steamer in New York harbor on June 30, 1942, bound for the British Isles. After he boarded the British vessel he was kept there and was not allowed to communicate with anyone on the outside. This was on account of guarding against submarine danger. The vessel, however, did not sail until the morning of July 1, 1942."

We contend that the hazards of war should be taken into consideration in this case. The Court well knows that vessels of the Allies leaving American ports did not dare reveal any detail of their departures because of the terrifying menace of the German submarine warfare. The ordinary rules of port were not being observed. Petitioner was to all intents and purposes completely under the jurisdiction of the British officers and they, under the necessary rules of the war, were independent in their actions.

Conclusion.

As noted in the beginning of this brief, this case of J. Gerber Hoofnel and the companion case of Michael Downs 11578 are in fact test cases involving many of the men who were recruited by Lockheed Overseas Corporation in the first half of 1942, to make an extraordinary contribution to the success of our war effort.

Untold penalty will be imposed upon many of these men under the construction urged by Respondent. We do not ask for any strained construction of the law and Regulations involved but do seek an interpretation fair to them and consistent with the history of the legislation and of the administration of the statute involved.

When, after these men went overseas, Sec. 116 I. R. C. was amended, admitted to prevent persons not acting *bona fide,* from easy evasion of the income tax. No effort was made to clarify the meaning of the term residence; no effort was made to require declaration of intent to change citizenship; no effort in fact was made to give this law any such interpretation as Respondent would here urge.

We respectfully urge:

That Your Honorable Court, in accord with the prayer of the petition herein, determine that there is no deficiency due from petitioner on his income for the calendar year ending December 31, 1943.

Respectfully submitted,

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Attorney for Petitioner.